# Maxisegar Sdn Bhd v Silver Concept Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–178 OF 2001
ABDUL KADIR SULAIMAN, TENGKU BAHARUDIN JJCA AND AZMEL J
5 MAY 2005

*Civil Procedure — Appeal — Adducing fresh evidence — Test to be applied — Evidence were public documents — Whether application should be granted — Courts of Judicature Act 1964 s69(3) — Rules of the Court of Appeal 1994 r 7(3A)*

*Contract Law — Damages — Liquidated damages — Whether penalty — Whether agreed liquidated damages was extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered and was therefore a penalty clause*

*Contract Law — Frustration — Sale and purchase of property — Failure to obtain loan to finance purchase — Whether frustration was self induced — Whether contract frustrated at all*

*Contract Law — Specific performance — Sale and purchase of land — Damages — Whether plaintiff can also claim for damages — Whether inconsistent to claim specific performance together with further or alternative claim of damages for breach of contract*

The appellant, a housing developer had entered into a sale and purchase agreement with a landowner ('the respondent') to purchase a piece of land. After payment of the deposit and several further payments towards the purchase price, the appellant informed the respondent that they had failed to obtain a loan to pay the balance of the purchase price, therefore the appellant had been lawfully discharged from further performance of the agreement. However, the respondent insisted on receiving the balance of the purchase price. The appellant then commenced proceedings in the High Court for a declaration that the contract had been frustrated and consequently the appellant was discharged from its obligation to perform the contract. The appellant also sought refund of all monies paid under the contract. The respondent filed a counter-claim and sought for an order of specific performance of the contract, compensation or damages in addition to the order of specific performance or alternatively, damages for breach of the contract in lieu of specific performance. The learned judge dismissed the appellant's claims with costs. He, however, did not make an order for specific performance but in lieu, he awarded the respondent damages under cl 10.1 of the agreement and ordered the forfeiture of the deposit and a further sum of equivalent to 11%pa on the third instalment (see [2001] 6 MLJ 762). The appellant attacked the trial judge's decision on the issues of frustration of the contract, the issue of the respondent's claims in the pleadings and the agreed liquidated damages under clause 10.1 of the agreement.

The appellant had also at the hearing of this appeal proper sought leave to admit the respondent's Directors' Report and Audited Accounts for the years 1997 and 1998 extracted from the Registry of Companies as further evidence.

**Held**, dismissing the appeal with costs:

(1) The power of the Court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s 69 (3) of the Courts of Judicature Act 1964 ('the CJA') and r 7(3A) of the Rules of the Court of Appeal 1994 ('the RCA'). 'The special grounds only' referred to in s 69(3) of the CJA and the tests set out in r 7(3A) of the RCA are generally known as the *Ladd v Marshall* conditions. The three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before leave to admit fresh evidence be granted: ie (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; (3) the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible (see para 4). In the present case, the appellant's supporting affidavits did not explain fully why the evidence could not have been made available in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial there (see para 6). Also, since the evidence sought to be admitted were clearly in the public domain, had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of this appeal could have been obtained during the trial of this action in the court below (see para 9).

(2) The learned trial judge had correctly guided himself on the law of frustration and came to a correct finding (see para 20). In the circumstances the contract was not frustrated. Even if the court were wrong on this issue, on the facts of this case the frustration of the contract, if any, was self-induced by the appellant (see para 22). On the facts and circumstances of this case there was no supervening event at all. The appellant had refused to comply with the Bank Negara guidelines on lending to the property sector and in the circumstances the banks were unable to grant the loan. This was a deliberate act of non-compliance by the appellant (see para 26).

(3) In this appeal the respondent had all along maintained its claim for specific performance right up to the conclusion of the trial and had never abandoned it. The respondent was at all material times ready, able and willing to carry out and perform its entire obligations under the agreement (see para 30). At the end of the trial it was the court that decided not to grant the respondent an order of specific performance of the agreement. A party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract is a perfectly usual claim (see para 31). Therefore, there was no inconsistency in the respondent maintaining a claim for specific performance and also

seeking damages for breach of the contract in lieu of specific performance (see para 32).

(4) The appellant had not demonstrated that the trial judge had indeed acted on a wrong principle or had made an entirely erroneous estimate of the damages. The trial judge had correctly awarded the agreed liquidated damages under cl 10.1 of the agreement. There was, therefore, no valid reason to call for appellate intervention (see para 36).

(5) A party who attacks a liquidated damages clause as a penalty is in fact asking the court to relieve him from his contractual obligations which he had freely undertaken in exchange for good consideration. The courts would therefore generally preserve the sanctity of the contract freely entered into by the parties (see para 37). In this appeal, the appellant had failed to demonstrate that the agreed liquidated damages in cl 10.1 of the agreement was extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered and was therefore a penalty clause. This agreement was drafted by the parties with the benefit of legal advice and the appellant and the respondent had both freely bargained and agreed upon to the formula of damages stipulated in cl 10.1 of the agreement as agreed liquidated damages. Thus, the agreed liquidated damages provision in cl 10.1 of the agreement was not a penalty clause and the court would preserve the sanctity of the contract freely entered into by the parties (see para 41).

[**Bahasa Malaysia summary**

Perayu, sebuah syarikat pemaju perumahan telah memasuki satu perjanjian jual beli dengan pemilik tanah ('responden') untuk membeli sebidang tanah. Selepas pembayaran wang deposit dan beberapa bayaran seterusnya terhadap harga belian, perayu memberitahu responden bahawa mereka gagal mendapat pinjaman untuk membayar baki harga belian, oleh yang demikian perayu telah secara sah dilepaskan dari pelaksanaan seterusnya di bawah perjanjian tersebut. Walau bagaimanapun, responden bertegas mahukan baki harga belian. Perayu kemudiannya memulakan prosiding di Mahkamah Tinggi untuk satu perisytiharan bahawa kontrak tersebut telah terkecewa dan dari itu perayu telah dilepaskan dari obligasi beliau untuk melaksanakan kontrak tersebut. Perayu juga menuntut pengembalian semula kesemua wang yang telah dibayar di bawah kontrak tersebut. Responden memfailkan tuntutan balas dan memohon satu perintah untuk pelaksanaan spesifik kontrak tersebut, pampasan atau gantirugi di samping perintah pelaksanaan spesifik atau secara alternatif, gantirugi untuk pengingkaran kontrak sebagai ganti pelaksanaan spesifik. Yang arif hakim menolak tuntutan perayu dengan kos. Beliau bagaimanapun, tidak membuat perintah untuk pelaksanaan spesifik tetapi sebagi ganti, beliau telah memberi award gantirugi kepada responden di bawah klausa 10.1 perjanjian tersebut dan memerintahkan perlucuthakan deposit tersebut dan selanjutnya wang berjumlah sama dengan

11% setahun ke atas ansuran ketiga (lihat [2001] 6 MLJ 762). Perayu menentang keputusan hakim bicara berhubung isu kekecewaan kontrak, isu tuntutan responden di dalam pliding dan gantirugi jumlah tertentu yang telah dipersetujui di bawah klausa 10.1 perjanjian tersebut.

Perayu juga semasa pendengaran rayuan ini memohon kebenaran untuk mengemukakan Laporan Pengarah dan Akuan diaudit responden untuk tahun 1997 dan 1998 yang dicabut dari pendaftar Syarikat sebagai keterangan lanjut.

**Diputuskan**, menolak rayuan dengan kos:

(1) Kuasa mahkamah untuk memberi kebenaran untuk mengemukakan keterangan baru semasa pendengaran rayuan diperuntukkan di bawah s69(3) Akta Mahkamah Kehakiman 1964 ('AMK') dan k 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). 'Alasan-alasan yang istimewa sahaja' yang dirujuk di dalam s 69(3) AMK dan ujian-ujian yang dinyatakan di dalam k 7(3A) KMR adalah secara amnya dikenali sebagai syarat-syarat *Ladd v Marshall.* Ketiga-tiga syarat tersebut adalah kumulatif dan berkait dan tidak dibaca secara berasingan yang mana kesemua syarat-syarat tersebut mestilah dipenuhi sebelum kebenaran untuk mengemukakan keterangan baru diberikan: iaitu (1) ianya mestilah ditunjukkan bahawa keterangan tersebut tidak dapat diperolehi dengan usaha yang wajar untuk digunakan semasa perbicaraan; (2) keterangan tersebut mestilah, jika dibenarkan, mungkin akan memberi pengaruh penting pada keputusan kes, namun ianya tidak perlu muktamad; dan (3) keterangan tersebut hendaklah boleh dianggap sebagai boleh dipercayai atau dalam lain perkataan, ianya hendaklah tampak boleh dipercayai, walaupun ia tidak perlu tidak dapat disangkal (lihat perenggan 4). Dalam kes semasa, afidavit-afidavit sokongan perayu tidak menerangkan secara jelas kenapa keterangan tersebut tiada semasa di mahkamah bawah dan kenapa ianya tidak dapat diperolehi dengan usaha yang munasabah untuk digunakan semasa perbicaraan di sana (lihat perenggan 6). Juga, oleh kerana keterangan yang ingin dikemukakan jelas berada di domain awam, jika perayu menggunakan usaha yang munasabah tentunya keterangan yang ingin dikemukakan sebagai keterangan baru di pendengaran rayuan ini dapat diperolehi dan dikemukakan semasa perbicaraan di mahkamah bawah (lihat perenggan 9).

(2) Hakim bicara telah secara betul mengarah dirinya berhubung dengan undang-undang kekecewaan dan telah mencapai keputusan yang betul (lihat perenggan 20). Dalam keadaan ini kontrak tersebut tidak dikecewakan. Walaupun jika mahkamah telah silap pada isu ini, pada fakta kes, kekecewaan kontrak, jika adapun adalah dibuat secara sendiri oleh perayu (lihat perenggan 22). Pada fakta dan keadaan kes ini, tiada langsung terdapat kejadian di luar jangka. Perayu tidak mahu mengikut garispanduan Bank Negara berhubung dengan pinjaman kepada sektor

hartanah dan dalam keadaan ini bank-bank tidak dapat memberi pinjaman. Ini merupakan perbuatan ketidakpatuhan yang sengaja oleh perayu (lihat perenggan 26).

(3) Dalam rayuan ini, responden pada setiap masa telah bertegas dengan tuntutannya untuk pelaksanaan spesifik sehingga ke akhir perbicaraan dan tidak pernah menggabainya. Responden pada setiap masa matan bersedia, mampu dan sanggup melaksanakan kesemua obligasi-obligasinya di bawah perjanjian tersebut (lihat perenggan 30). Pada akhir perbicaraan, mahkamah yang berkeputusan untuk tidak memberi responden perintah untuk pelaksanaan spesifik perjanjian tersebut. Tuntutan untuk pelaksanaan spesifik perjanjian bersama dengan tuntutan lanjut atau tuntutan alternatif gantirugi untuk pengingkaran kontrak adalah satu tuntutan yang lazim (lihat perenggan 31). Oleh yang demikian, tidak terdapat ketidak-konsistenan pada pihak responden dalam tuntutannya untuk pelaksanaan spesifik dan juga gantirugi untuk pengingkaran kontrak sebagai ganti pelaksanaan spesifik (lihat perenggan 32).

(4) Perayu tidak menunjukkan bahawa hakim bicara telah bertindak di atas prinsip yang salah atau telah membuat satu anggaran gantirugi yang silap. Hakim bicara dengan betul memberi award gantirugi jumlah tertentu dibawah klausa 10.1 perjanjian tersebut. Oleh yang demikian tiada alasan yang sah untuk mewajarkan campurtangan rayuan (lihat perenggan 36).

(5) Sesuatu pihak yang menentang klausa gantirugi jumlah tertentu dan mengatakannya sebagai satu penalti sebenarnya memohon mahkamah untuk melepaskannya dari obligasinya dibawah kontrak yang beliau telah secara sukarela memasuki dengan pertukaran balasan yang wajar. Mahkamah dengan itu secara amnya akan memelihara kesucian kontrak yang dimasuki secara sukarela oleh pihak-pihak (lihat perenggan 37). Didalam rayuan ini, perayu telah gagal untuk menunjukkan yang gantirugi jumlah tertentu yang telah dipersetujui di bawah kl. 10.1 perjanjian tersebut keterlaluan, sangat tinggi atau tidak wajar berbanding dengan kerugian yang mungkin dialami dan dengan itu adalah satu klausa penalti. Perjanjian tersebut telah didraft oleh pihak-pihak dengan bantuan nasihat dari penasihat undang-undang dan perayu dan responden dengan bebas telah tawar-menawar dan bersetuju dengan formula gantirugi sebagaimana yang diperuntukkan di bawah klausa 10.1 perjanjian tersebut sebagai gantirugi jumlah tertentu. Dari itu, peruntukan gantirugi jumlah tertentu di bawah klausa 10.1 perjanjian tersebut bukanlah satu klausa penalti dan mahkamah akan memelihara kesucian kontrak yang dimasuki secara sukarela oleh pihak-pihak (lihat perenggan 41).]

**Notes**

For cases on adducing fresh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 588–592.

For cases on frustration of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1604-1620.
For cases on liquidated damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2903–2923.
For cases on specific performance sale and purchase of land, see 3 *Mallal's Digests* (4th Ed, 1997 Reissue) paras 2964–2972.

**Cases referred to**

*Ardeshir v Flora Sassoon* AIR 1928 PC 208 (refd)
*Beihai Zingong Property Development Co & Anor v Ng Choon Meng* [1999] 3 SLR 283 (refd)
*Chai Yen v Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 (refd)
*Dato Yap Peng & Ors v Public Bank Bhd & Ors* [1997] 3 MLJ 484 (refd)
*Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (refd)
*Esanda Finance Corp Ltd v Plessnig & Anor* (1989) 84 ALR 99 (refd)
*Esley v JG Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1 (refd)
*Hipgrave v Case* (1885) 28 Ch D 356 (refd)
*Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310 (refd)
*Ladd v Marshall* [1954] 3 All ER 745 (refd)
*Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd* [2000] 3 MLJ 136 (refd)
*Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 (refd)
*Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 (refd)
*Lee Seng Hock v Fatimah bte Zain* [1996] 3 MLJ 665 (refd)
*Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (refd)
*Neylon v Dickens* [1987] 1 NZLR 402 (refd)
*Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (refd)
*Ramli bin Zakaria and Ors v Government of Malaysia* [1982] 2 MLJ 257 (refd)
*Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44 (refd)
*Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 (refd)
*Tan Meng San v Lim Kim Swee* [1962] MLJ 174 (refd)
*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (refd)
*Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 (refd)
*Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92 (refd)

**Legislation referred to**

Civil Law Act 1956 ss 15, 16
Contracts Act 1950 ss 57, (2), 75
Courts of Judicature Act 1964 s 69(3)
Rules Court of Appeal 1994 r 7(3A)

*KS Narayanan (Joginder Singh, CT Annathurai, Logan Sabapathy, A Vishnu Kumar and Tharminder Singh with him) (Logan Sabapathy & Co) for the appellant.*
*VK Lingam (VK Lashmi with him) (VK Lingam & Co) for the respondent.*

**Abdul Kadir Sulaiman JCA** (delivering judgment of the court):

**[1]** Maxisegar Sdn Bhd the appellant, had appealed against the entire judgment of the High Court given on 7 March 2001. We had on 5 May 2005 dismissed the appellant's appeal with costs. We now give our reasons for doing so. Before that, we will deal with the appellants motion in the appeal, to adduce fresh evidence which was not then before the learned judge.

**[2]** We had on 24 February 2004 dismissed the appellant's notice of motion to adduce fresh evidence at the hearing of this appeal. The appellant had in this notice of motion sought leave of this court to admit the respondent's Directors' Report and Audited Accounts for the years 1997 and 1998 extracted from the registry of companies ('company accounts') as further evidence at the hearing of this appeal proper.

**[3]** We had after hearing the appellant's counsel dismissed the notice of motion with costs. We did not call upon the respondent's counsel to respond as we formed the view that the appellant's application to adduce fresh evidence did not meet the prerequisite conditions. We now give our reasons for the dismissal.

**[4]** The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s 69 (3) of the Courts of Judicature Act 1964 and r 7(3A) of the Rules Court of Appeal 1994. 'The special grounds only referred to in Section 69(3) of th« Courts of Judicature Act and the tests set out in r 7(3A) of the Rules of the Court of Appeal 1994 are generally known as the *Ladd v Marshall* [1954] 3 All ER 745 conditions. It is settled by various decided cases that the three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted. The said three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 at p 148 as follows:

> It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v Marshall*:
>
> > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.
> >
> > I pause to observe that these conditions are not alternative; they are cumulative.

See also the judgment of Suffian FJ in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 at p 71 and *Chai Yen v Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 at p 143.

**[5]** In the present case before us, we found that the appellant's supporting affidavits did not explain fully why the evidence could not have been made available in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial there. This requirement is clearly stated in the *English Supreme Court Practice 1997*, Vol 1 at p 1004 as follows:

> 59/10/14 Mode of application for leave to adduce further evidence ...
>
> ... The application must be supported by an affidavit deposing to the facts relied upon in support of the application. In particular the affidavit should explain fully why the evidence was not called in the court below, and where the *Ladd v Marshall* criteria apply, why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial ...

**[6]** We found that the appellant's supporting affidavits did not state these relevant facts in order to fulfill the requirements for the admission of the so-called fresh evidence before us.

**[7]** The appellant had also failed to satisfy the first test. As admitted by the appellant in para 16 of the affidavit of Gan Ee Chin affirmed on 13 March 2002, the company accounts were available as a public document In the registry of companies then. The company accounts were clearly in the public domain. They were not hidden away by the respondent or for that matter by any other party but for the reason that it was not so made available by the appellant. This evidence could have been made available during the trial if due diligence was taken. If the appellant had conducted a simple search at the registry of companies the said company accounts could have been easily obtained for use at the trial. This the appellant had failed to do. The various reliefs claimed by the respondent in its pleadings were also plain and clear. In our judgment, the appellant could not have been misled by the respondent's pleadings and claims. It was therefore the duty of the appellant to bring forward its whole case at once in the trial and not to bring them forward as and when it thought appropriate to do so. To a question from the court, counsel for the appellant admitted that they had missed it at the trial.

**[8]** In our judgment, had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of this appeal could have been obtained during the trial of this action in the court below. We therefore found that there was no merit in the appellant's application before us to adduce the fresh evidence and we had accordingly dismissed the application with costs.

**[9]** We now come to deal with the appeal proper and state the brief facts. The appellant, Maxisegar Sdn Bhd is a housing and/or property developer. The respondent, Silver Concept Sdn Bhd is a landowner. The parties entered into a sale and purchase agreement on 31 March 1997 whereby the respondent agreed to sell 1142.48 acres of land and the appellant agreed to purchase the

said land for a total purchase price of RM217,071,200 upon the terms and conditions contained in the agreement

**[10]** Prior to the signing of the sale and purchase agreement, the appellant paid an earnest deposit of RM4,000,000. Upon the execution of the agreement, the appellant paid a further deposit of RM17,707,120 making a total amount of RM21,707,120 representing 10% of the purchase price of the property. On30 June 1997 the appellant paid a further sum of RM20,364,080 to the respondent's solicitors as stakeholders. By a High Court consent order dated 21 March 1998 this further sum of RM20,364,800 together with accrued interest thereon was paid by the respondent's solicitors into court. Thus it is to be noted that of the total purchase price of RM217,071,200 of the said land, the balance remaining to be paid by the appellant was RM175,000,000 by the extended completion date determined to be 31 December 1997 pursuant to cl 4.2 of the agreement.

**[11]** Then, by a letter dated 13 December 1997, the appellant informed the respondent that they had failed to obtain the loan to pay the balance of the purchase price. This was followed by a letter from the appellant's solicitors dated 22 December 1997 informing the respondent's solicitors of the same fact with the consequent that the appellant has been lawfully discharged from further performance of the agreement. The appellant also demanded the refund of all monies paid earlier under the agreement The appellant solicitor's letter was in the following terms:

Bil Kami: CMY.245.Larut.416A.97.yk
Tarikh: 22 Disember 1997

Messrs Rajah Lau & Associates
Advocates & Solicitors
Suit 488, 4th floor,
Wisma Methodist
No 1, Lorong Hang Jebat
50150 Kuala Lumpur

Attn: Mr Eg Kaa Chee

Dear Sirs,

Re: Sale And Purchase Agreement Dated 31 March 1997

Vendor : Silver Concept Sdn Bhd
Purchaser : Maxisegar Sdn Bhd

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We refer to the above matter wherein we act for Messrs Maxisegar Sdn Bhd, the purchaser and you act for Messrs Silver Concept Sdn Bhd, the vendor.

We refer to the above matter, our client's letter dated 13 December 1997 addressed to the vendor and to our letters to you dated 15 December 1997 and 18 December 1997.

It was provided in the above agreement that our clients would be obtaining a loan from their bankers and/or financiers to assist them in completing the purchase of the land from your clients.

In view of the:

(1) financial turmoil that our country is going through presently;

(2) the light liquidity position prevailing in the country; and

(3) Bank Negara Malaysia issuing guidelines and/or circulars to all financial institutions in the country to curtail and/or discourage and/or prohibit lending to broad property sector, our clients through no fault of theirs have not been able to raise any loan from their bankers to pay for the balance of purchase price or substantial part thereof to complete the purchase of your clients' land.

In the premises our clients have been lawfully discharged from further performance of the above agreement.

Our clients therefore require you and your clients to refund all monies that have been paid to you (and held by you as stakeholders) and to your clients by 4pm on Friday, 26 December 1997, failing which our clients shall take such action against you and your clients as they may be advised in the circumstances of the case.

Yours faithfully,

cc. Clients

**[12]** The respondent's solicitors responded by letter on 26 December 1997 which was as follows:-

CMY.245.LARUT.416A.97

26 December 1997

EKC/9957/SC/SPA/97

Hamzah Abu Samah & Partners
Advocates & Solicitors
Suite 2101 ,Tlngkat 21
Wisma Hamzah-Kwong Hing
No 1 Leboh Ampang
50100 Kuala Lumpur

Dear Sirs,

Re: Sale And Purchase Agreement Dated 31 March 1997

Vendor : Silver Concept Sdn Bhd
Purchaser : Maxisegar Sdn Bhd

With reference to the above matter and our client's letter to your client dated 18December 1997 and our letter to you dated 19 December 1997, we are instructed to state as follows:

(a) your claim that your client has been discharge from further performance of the above agreement is invalid;

(b) your client is reminded to pay the balance of purchase price to us as stakeholders In accordance with cl 4.2 of the agreement failing which our client shall take the necessary action against your client to enforce their rights provided in the agreement and under the laws of Malaysia.

Yours faithfully,

Eg Kaa Chee

cc. Silver Concept Sdn Bhd

(Attn: Mr Ng/Mr Chua).

**[13]** The appellant then commenced proceedings in the High Court below claiming various reliefs against the respondent. The appellant, *inter alia*, claimed for a declaration that the contract has been frustrated and consequently the appellant is discharged from its obligation to perform the contract. The appellant also sought refund of all monies paid under the contract.

**[14]** The respondent filed a counter-claim and sought, *inter alia*, a declaration that the said contract has not been frustrated and claimed for an order of specific performance of the contract. The respondent also claimed compensation or damages in addition to the order of specific performance or alternatively, damages for breach of the contract in lieu of specific performance.

**[15]** After a full trial the learned judge dismissed the appellant's claims with costs. He, however, did not make an order for specific performance as prayed for by the respondent for the reason that an order for specific performance may not be just In view of the appellant's inability to pay the balance of the purchase price. In lieu, he awarded the respondent damages under cl 10.1 of the agreement and ordered the forfeiture of the deposit of RM21,707,120 and a further sum of equivalent to 11%pa on the third instalment of RM130,242,720 calculated from the due date ie 30 September 1997 to the date of forfeiture ie, date of judgment which was on 7 March 2001 by way of agreed liquidated damages, in favour of the respondent. The High Court judgment was reported in [2001] 6 MLJ 762.

**[16]** The appellant had in their memorandum of appeal and submissions before this court attacked the trial judge's decision on several grounds. We find that the grounds that merit our consideration are the issues of frustration of the contract, the issue of the respondent's claims in the pleadings and the agreed liquidated damages under cl 10.1 of the agreement.

(A) The Issue Of Frustration

**[17]** We now deal with the issue of frustration. The appellant's counsel submitted that the obtaining of a loan from financial institutions by the appellant

to pay a substantial portion of the purchase price was clearly known and in the contemplation of the parties as noted from the terms of the agreement. He submitted that the failure of the appellant to obtain a loan to pay the balance of the purchase price due to the liquidity problem and Bank Negara ruling on lending to the broad property sector was a supervening event beyond the control of the appellant and as a result the agreement became frustrated and void pursuant to s 57 of the Contracts Act 1950 read with ss 15 and 16 of the Civil Law Act.

**[18]** The trial judge had admirably dealt with the issue of frustration and concluded that the contract was not frustrated on account of the respondent's failure to obtain a loan to pay the balance of the purchase price. This is what the trial judge said in his judgment (appeal record pp 32 to 37):

> Findings:
>
> From the evidence adduced before the court during the trial, it is clear that the plaintiff intended to get a loan in order to pay off the balance sum. But unfortunately for the plaintiff, the economic recession had set in at that material time. This together with BNM's circulars which were not in the plaintiff's favour, led to the plaintiffs inability to secure the requisite loan to enable it to complete the purchase of the land. In the case of *Universal Corp v Five Ways Properties Ltd* [1979] 1 All ER 552, the CA in referring to the doctrine of frustration said at p 554 as follows:
>
> The judge dealt with the topic of frustration quite shortly. He said:
>
> But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.
>
> That seems to me to be an accurate and proper statement...
>
> However, there is no provision in the agreement to say that the agreement is conditional upon the plaintiff getting a loan in order to perform its obligation under the agreement. The defendant on the other hand is ready, willing and able to perform its part of the agreement. The court can only construe the terms of the agreement as contained in the agreement. The Court cannot put in terms which have not been agreed upon by the parties.
>
> Hashim Yeop Sani CJ (Malaya) In the case of *Koh Siak Pao v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 at p 168 said:
>
> Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to Introduce or add new terms to it.'
>
> When the plaintiff entered into this agreement, it took the risk of hoping to get a loan. When it failed to get the said loan then it would have to bear the consequences of the risk. In the case of *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164, Buckley LJ at p 173 stated:
>
> But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk Is a loss which must lie where it falls.

The land is still available, for the plaintiff. The first defendant is still ready and able to sell it to the plaintiff. It is the plaintiff's misfortune that it could not get the loan it hoped for. In *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257, the Supreme Court held at p 262 as follows:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

For the above reasons, it cannot be said that that the contract has been frustrated. As such, the plaintiff action is dismissed with costs.

As to the first defendant's counterclaim, an order for specific performance may not be just in view of the plaintiff's inability to pay the balance.

Regarding damages for breach of the agreement:

> Clause 10.1 of the agreement provides that in the event of any breach by the purchaser of any provisions of the agreement, the vendor, that is, the first defendant shall be entitled to:
>
> (1) forfeit the first instalment; and
>
> (2) the sum equivalent to 11% pa on the third instalment or portion thereof remaining unpaid/outstanding, calculated from the due date until the date of forfeiture by way of agreed liquidated damages.

Under the agreement:

> The first instalment paid was RM21,707,120
>
> The third instalment due was RM130,242,720

I would therefore allow the first defendant's claim for breach of contract by the plaintiff for the forfeiture of the first instalment and a further sum equivalent to 11% pa on the third instalment of RM130,242,720 calculated from the due date 30September 1997 until the date of such forfeiture, that is today. This amount can be utilised from the stakeholders sum plus interest (of RM21,954,318.45) which was paid into court by way of set off and the amount deposited in court together with all interest therein be released to the first defendant.

**[19]** In our judgment the learned trial judge had correctly guided himself on the law of frustration and came to a correct finding. We find no error in his finding that the contract in this case was not frustrated and we affirm his decision.

**[20]** The appellant's counsel urged upon us to review the law of frustration in light of the Indian case of *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44 and include the word 'impracticability' to s 57(2) of the Contracts Act. We cannot agree because the section is clear. It refers to two situations wherein a contract can become void, and therefore frustrated. The correct

interpretation of the section has been given by our Federal Court in *Ramli Bin Zakarla and Ors v Government of Malaysia* [1982] 2 MLJ 257 and our Court of Appeal in the cases of *Dato Yap Peng & Ors v Public Bank Bhd & Ors* [1997] 3 MLJ 484, *Lee Seng Hock v Fatimah bte Zain* [1996] 3 MLJ 665, *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 and *Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd* [2000] 3 MLJ 136. In interpreting s 57(2) of the Contracts Act, our courts have adopted the test formulated by the House of Lords in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.

**[21]** We wholly agree with the trial judge's finding that in this case, in the circumstances it happened, the contract is not frustrated. Even if we are wrong on this issue we find that on the facts of this case the frustration of the contract, if any, was self-induced by the appellant. When Arab-Malaysian Merchant Bank Bhd agreed by letter of 23 April 1997 to arrange for the requisite financing facility for the appellant to complete the purchase of the land there was a Special Condition incorporated therein in the following terms:

> The borrower shall undertake that the development it intends to carry out on the Land shall comprise residential units priced at RM150,000 and below, industrial units and other units acceptable to AMMB to comply with Bank Negara Malaysia's prevailing guidelines on lending to the property sector.

**[22]** The appellant's witnesses, SP2 and SP3 had given evidence at the trial that this Special Condition imposed by the bank was accepted by the appellant and the appellant had agreed to comply with them.

**[23]** The bank's subsequent letter to the appellant dated 26 May 1997 also contained the above Special Condition under item (1) of the conditions of approval. Under condition (8) of the Additional Conditions Precedent to Drawdown, it was stated that:

> The project land has been approved by the relevant authorities for mixed development which shall comprise of 40% industrial and 60% residential development.

**[24]** However, the appellant subsequently requested the bank to exclude the above two crucial conditions. The bank had in a letter to the appellant dated 27 July 1997 agreed to exclude the above two crucial conditions and put the appellant on notice that with these exclusions, the bank will not be able to participate as a lender in the syndication for the loan, and that with these changes the number of financial institutions which could participate in the loan syndication would be significantly reduced. The bank, however, would continue to maintain Its role as arranger and manager for the syndication on a best-effort arrangement basis. The bank called for the acceptance by the appellant of the new arrangement to which the appellant duly accepted.

**[25]** The bank subsequently notified the appellant by letter dated 3 December 1997 that it was unable to conclude the syndication of the loan due to unfavorable response from potential lenders. The letter also stated that most of the

financial institutions had cited liquidity as the main problem coupled with Bank Negara Malaysia's ruling on lending to the broad property sector. In view of the above, the bank informed the appellant that It was unable to conclude the syndication and asked the appellant to arrange for other alternatives with respect to the purchase of the said land from the respondent.

**[26]** We have carefully scrutinised the appeal record and we find that on the facts and circumstances of this case there was no supervening event at all. The appellant had refused to comply with the Bank Negara guidelines on lending to the property sector and in the circumstances the banks were unable to grant the loan. This was a deliberate act of non-compliance by the appellant We hasten to add that on the factual matrix of this case there was no frustration at all. It was a self-induced frustration, if at all to be called frustration. In *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 at p 710 the Court of Appeal held that:

> Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See *Dato Yap Peng & Ors v Public Bank Bhd & Ors* [1997] 3 MLJ 484.

**[27]** In *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 the Privy Council held at p 530 that:

> The essence of 'frustration' is that it should not be due to the act or election of the party.
>
> …
>
> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party to treat the contract as repudiated.

**[28]** Another ground advanced by the appellant is that the respondent cannot maintain an action for breach of contract when its principal claim for specific performance was not granted by the trial judge. The appellant's counsel submitted that such inconsistent causes of action cannot be maintained because the claim for specific performance is on the basis that the agreement is afoot whereas the claim for damages for breach of agreement or damages for breach of undertaking is on the basis that the agreement is not afoot. He relied on the cases of *Ardeshir v Flora Sassoon* AIR 1928 PC 208 (PC), *Hipgrave v Case* (1885) 28 Ch D 356, *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310 to substantiate his argument on this point.

**[29]** In response the respondent's counsel submitted that this issue was not pleaded nor was it argued in the court below. He submitted that there is no inconsistency in the respondent maintaining a claim for specific performance of the contract and also seeking damages for breach of contract in lieu of

specific performance and he cited several authorities to support his submission. He also distinguished the cases cited by the appellant and submitted that the appellant's submission on this issue is completely misconceived in law and suffers from a serious fallacy.

**[30]** We find that this ground was not raised by the appellant in the court below. As this is a question of law we will deal with it. We have carefully studied the cases cited by the appellant's counsel and we find that the principles expounded in those cases are not applicable to this appeal. In the case of *Ardeshire v Flora Sassoon*, the plaintiff had abandoned his claim for specific performance nine months before the trial. In *Hipgrave v Case*, the plaintiff had abandoned his claim for specific performance at the trial. In *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* the respondent decided to abandon the prayer for specific performance at the hearing in chambers. We find that in this appeal the respondent had all along maintained its claim for specific performance right up to the conclusion of the trial and had never abandoned it. The respondent was at all material times ready, able and willing to carry out and perform its entire obligations under the agreement. The question of abandonment is very important and was clearly emphasised by the court of appeal in the case of *Tan Meng San v Lim Kim Swee* [1962] MLJ 174 at p 178 as follows:

> There is a wide distinction between the present case and the case of *Ardeshlre H Mama v Flora Sassoon* which was cited by Mr Hills. In that case the suit was in its inception an action for specific performance of a contract for the sale of land with claims for damages in addition or in the alternative. The claim for specific performance was later abandoned by the plaintiff who at the trial claimed damages for breach of contract. In the Judicial Committee their Lordships (per Lord Blanesburgh) discussed at some length the history of the equitable relief of specific performance, and considered the effect of s 19 of the Indian Specific Relief Act (s18 of our Ordinance) in the light of decisions on s 2 of Lord Cairns' Act. The conclusion at which their Lordships arrived was that where a claim for specific performance of a contract is joined with a claim for damages for breach of the contract and the claim for specific performance is abandoned, there is no power in the Court to award damages without an 'apt and sufficient amendment of the plaint'. The position in the present case is, however, quite different, for here the respondent has never expressly abandoned his claim for specific performance and his election to sue on a severable part of the contract, as he did in Civil Suit No 51 of 1959, does not in the circumstances amount to an implied abandonment of that claim.

**[31]** In the trial below the respondent had throughout maintained the claim for specific performance. It was reinforced in their written submission before the court (appeal record pp 298–307). At the end of the trial it was the court that decided not to grant the respondent an order of specific performance of the agreement. A party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract is a perfectly usual claim. The Privy Council had held in the case of *Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92 at pp 93 and 94 as follows:

A The action was on its face a normal one for specific performance requiring the vendor (present appellant) to transfer the land to the purchaser in fact Loh Koon Moy, Lam Wai Kee having acted on her behalf. The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract — a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff ...

B

…

The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion.

C

**[32]** We therefore hold that there is no inconsistency in the respondent maintaining a claim for specific performance and also seeking damages for breach of the contract in lieu of specific performance. This is fortified by the case of *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at p 521 in the following passage:

D

Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead). The logic in the judgment of Scholl J would be hard to refute, for if the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end, Until the contract is brought to an end by the action of the court, the contract remains on foot.

E

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**[33]** We agree with the respondent's submission that particularly in the area of contracts for the sale of land a party in a suft must put forward all its claims in one and the same cause of action. We adopt the following passage in the case of *Neylon v Dickens* [1987] 1 NZLR 402 at pp 409 and 410:

G

In the particular field of contracts for the sale of land this court held as long ago as 1902 in *Dillon v Macdonald* 21 NZLR 375, 393, that every remedy that can be claimed in respect of the same cause of action must, under New Zealand procedure, be claimed in the one action. And that as the plaintiff there could have made in the former action (an action for specific performance dismissed for unreasonable delay) her alternative claim (a claim to common law damages for breach of the same contract) she could not by dint of having limited her prayer for relief in the first action take a second proceeding claiming another remedy on the same cause of action.

H

Whether the present is strictly a case of merger arising from res judicata (as Hardie Boys J thought), or estoppel per *rem judicatam*, or simple abuse of procedure, it is unnecessary to debate. In our opinion it is plain that the delay-in-settlement claims for damages arise on the same cause of action as led to the decree for specific performance.

I

The purchasers should have put forward all their claims on that cause of action timeously, under the supplementary jurisdiction if need be, In the first action. They failed to do so and must accept the consequences.

(B) THE AWARD OF AGREED LIQUIDATED DAMAGES UNDER CL 10.1 OF THE AGREEMENT

**[34]** The trial judge had in his judgment held that the appellant was in breach of contract and awarded damages pursuant to clause 10.1 of the agreement. We now reproduce clause 10.1 of the agreement which is in the following terms:

Default By The Purchaser

10.1 In the event of any breach by the purchaser of any of the provisions of this agreement the vendor shall (subject to and after the expiry of a notice in writing to the purchaser requiring the purchaser to remedy such breach(es) within thirty (30) days from the date thereof provided always that such notice is only necessary if the breach(es) does/do not involve the payment of the second instalment or the third instalment) be entitled to forfeit the first instalment and the sum equivalent to eleven per centum (11%) per annum on the third instalment or portion thereof remaining unpaid/outstanding calculated from the due date until the date of such forfeiture by way of agreed liquidated damages and the vendor's solicitors shall refund to the purchaser all other monies paid by the purchaser towards the purchase of the land (free of interest) in exchange for the titles whereupon this agreement shall terminate and cease to be of any further effect but without prejudice to any right which either party may be entitled to against the other party In respect of any antecedent breach of this agreement.

**[35]** It is trite law that an appellate court would be justified in interfering by reassessing the damages where the judge below had acted on a wrong principle or has made an entirely erroneous estimate of the damages and not otherwise. In the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 799 Tan Sri Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court held as follows:

We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate court would be justified in interfering by assessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v Lovell* [1935] 1 KB 354 at p 360. He said:

... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it. In the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

A In other words the two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.

**[36]** The appellant had not demonstrated to us that the trial judge had indeed acted on a wrong principle or had made an entirely erroneous estimate B of the damages. In our judgment the trial judge had correctly awarded the agreed liquidated damages under cl 10.1 of the agreement. There is, therefore, no valid reason to call for our appellate intervention.

**[37]** We now consider whether the amount of damages under cl 10.1 of the C agreement is a penalty. We did not hear serious arguments from the appellant's counsel on this point. It Is now established that a party who attacks a liquidated damages clause as a penalty is in fact asking the court to relieve him from his contractual obligations which he had freely undertaken in exchange for good consideration. The courts would therefore generally preserve the D sanctity of the contract freely entered into by the parties. (See the case of *Beihai Zingong Property Development Co & Anor v Ng Choon Meng* [1999] 3 SLR 283 at pp 286 and 287).

**[38]** In *Esley v JG Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1 at p 15 E the Supreme Court of Canada held that:

It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

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**[39]** The High Court of Australia had held in *Esanda Finance Corp Ltd v Plessnig & Anor* (1989) 84 ALR 99 that an agreed sum is a penalty if It Is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered.

G

**[40]** In the case of *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 the appellant forfeited 10% of the purchase price and was awarded interest at 13% per annum on the balance purchase price and was also awarded interest at 19% per annum on the outstanding instalments. The court of appeal overruled the trial judge's finding that the H extra 13% interest imposed by the appellant was caught by s 75 of the Contracts Act 1950. Her Ladyship Dato' Siti Norma Yaakob JCA (as she then was) held at pp 522, 523 and 524 as follows:

I As for items (ii) and (iii) the principal objection raised is on the rates of interest chargeable as being excessive and a penalty under s 75 of the Contracts Act 1950.

…

As no part of the balance of the purchase price had been paid at all by the respondent, I cannot see how it can object to the imposition of 13% interest as that was the rate of interest agreed upon default under para (b) of the second schedule. Likewise the imposition of 19% interest on the arrears of instalments as that rate of interest is allowed by s 5.16 of the agreement. Perhaps the only issue is whether the increased interest at 19% pa is caught by s 75 of the Contracts Act 1950.

To bring that increased or penalty interest within the ambit of s 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that It could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% pa on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest cannot be caught by s 75.

I am aware that the 'Explanation' to s 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the 'Explanation' is not mandatory in nature as the legislature preferred the word 'may' as opposed to 'shall'. Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the 'Explanation' in s 75.

**[41]** In this appeal before us now, the appellant has failed to demonstrate to us that the agreed liquidated damages in cl 10.1 of the agreement is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered and is therefore a penalty clause. We had earlier pointed out that this agreement was drafted by the parties with the benefit of legal advice and the appellant and the respondent had both freely bargained and agreed upon to the formula of damages stipulated in cl 10.1 of the agreement as agreed liquidated damages. We therefore hold the agreed liquidated damages provision in cl 10.1 of the agreement is not a penalty clause. We would preserve the sanctity of the contract freely entered into by the parties.

**[42]** The judgment under appeal before us now does not contain any misdirection or errors that warrants our appellate interference. In fact after carefully scrutinizing the appeal record and having heard the rival submissions of the parties' counsel we are fully satisfied that the trial judge below had properly guided himself on the relevant law and principles applicable and had come to correct findings of fact on the issues before him. We therefore dismiss the appellant's appeal with costs. We affirm the decision of the High Court.

**[43]** We extend our appreciation to both counsel for the appellant and the respondent for their well researched submissions and presentation which has made our decision very much easier.

**A** **[44]** My learned brothers Tengku Dato' Baharudin Shah bin Tengku Mahmud JCA and Dato' Azmel bin Haji Maamor J have read the draft judgment and concur with it.

*Appeal dismissed with costs.*

**B**

Reported by Loo Lai Mee

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